

## Tooher & Barone, LLP

Please see the attached comment letter from Tooher & Barone, LLP.



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March 29, 2018

Commissioners  
Delaware River Basin Commission  
West Trenton, NJ

**RE: Proposed Amendments to the Administrative Manual and Special Regulations Regarding Hydraulic Fracturing Activities; Additional Clarifying Amendments**

Dear Commissioners:

I am writing regarding the Delaware River Basin Commission's ("DRBC" or "Commission") proposed regulations concerning natural gas development and hydraulic fracturing in the Delaware River Basin watershed (the "Basin"). I support the Commission's proposal to exclude hydraulic fracturing ("fracking") from the Basin, however, I also express my concern for certain aspects of the DRBC's proposed regulations. Therefore, I request that the DRBC enact a complete and permanent prohibition on natural gas development and hydraulic fracturing and all related activities; including without limitation, drilling, fracking, wastewater processing and discharges from and water withdrawals for drilling and fracking operations throughout the Basin.

As an environmental lawyer, and avid angler as well as hunter, I am a frequent visitor to the Delaware River Basin for work and recreation, and I have experience working with the NYS Department of Environmental Conservation ("NYSDEC"), landowners and not-for-profit conservation organizations in efforts to promote the recreational uses, support private interests in growing the local economy and most of all, protecting the environmental quality of the Basin. I highly value and enjoy the Wild and Scenic Delaware River and its outstanding recreational resources. The entire drainage area that flows to the non-tidal Delaware River, which extends from Hancock NY to Trenton NJ, is designated as Special Protection Waters and is the longest stretch of anti-degradation waters in the nation. These prized assets provide important economic benefit to all four states whose tributaries flow to the Delaware River and thus, deserve the utmost protection.

**Historical Background**

As the federal-interstate agency formed under a Compact in 1961<sup>1</sup> to manage the water resources of the Watershed, the Commission members – the Governors of Pennsylvania, New

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<sup>1</sup> United States: Public Law 87-328, Approved September 27, 1961, 75 Statutes at Large 688; Delaware: 53 Delaware Laws, Chapter 71, Approved May 26, 1961; New Jersey: Laws of 1961, Chapter 13, Approved May 1, 1961; New York: Laws of 1961, Chapter 148, Approved March 17, 1961; Pennsylvania: Acts of 1961, Act No. 268, Approved July 7, 1961.

York, New Jersey, and Delaware and the federal government – take action to protect the shared waters that provide over 15 million people with drinking water, including New York City and Philadelphia. The DRBC acts based on its powers to establish standards, plans, rules and regulations, and to control, prevent and abate pollution from activities that may have a substantial effect on the water resources of the Basin.<sup>2</sup> Through these means the DRBC works to protect public health and preserve basin waters<sup>3</sup> to meet “present and future needs”.<sup>4</sup> I applaud and support the DRBC’s mission, which equally protects all watershed states, those who live, work and recreate here now and those generations yet to come.

There is significant evidence that natural gas development, and its related operations, which include all the phases of the hydraulic fracturing process, from the first stage of industrial land preparation; to the storage, handling and use of chemicals and additives for extraction and stimulation; to drilling and fracking; to the withdrawal of and degradation of large volumes of water and its discharge and disposal as waste; has substantial adverse effects on public health, property interests, agriculture, and on our air, water, and land.<sup>5</sup> The natural gas industry has received unprecedented exemptions from our nation’s most important environmental and public health laws, including the Safe Drinking Water Act, Clean Air Act, and the Clean Water Act.<sup>6</sup>

The DRBC currently prohibits permitting for natural gas extraction projects in the Delaware River Basin. The Commissioners enacted a drilling moratorium by Resolution in May 2010<sup>7</sup>. As stated by the DRBC when Executive Director Carol Collier first removed the thresholds for project review in 2009: In taking this action, Collier considered and determined that as a result of water withdrawals, wastewater disposal, and other activities, natural gas extraction projects in shale formations may individually or cumulatively affect the water quality of Special Protection Waters by altering their physical, biological, chemical or hydrological characteristics.<sup>8</sup> The current *de facto* moratorium on gas drilling, fracking, and associated activities includes wastewater discharges and water withdrawals. DRBC permits for wastewater discharges since 2010 have been conditioned on the prohibition of fracking wastewater to prevent degradation.

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<sup>2</sup> Delaware River Basin Compact, 1961 <http://www.nj.gov/drbc/library/documents/compact.pdf>.

<sup>3</sup> Delaware River Basin Compact, 1961 Section 5.2

<sup>4</sup> Delaware River Basin Compact, 1961, Section 13.1

<sup>5</sup> PSE Healthy Energy Library, [https://www.zotero.org/groups/pse\\_study\\_citation\\_database/items](https://www.zotero.org/groups/pse_study_citation_database/items); See Compendium, <http://concernedhealthny.org/compendium/>, p. 4; Environmental Protection Agency (EPA). 2015. U.S. EPA. Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-16/236F, 2016. Available at: [www.epa.gov/hfstudy](http://www.epa.gov/hfstudy) and <https://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=332990>; PADEP, accessed 10.25.2017 at: [http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/OilGasReports/Determination\\_Letters/Regional\\_Determination\\_Letters.pdf](http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/OilGasReports/Determination_Letters/Regional_Determination_Letters.pdf)

<sup>6</sup> NRDC Policy Basics, 2013. Available at: <http://bit.ly/2yPF7Re>

<sup>7</sup> DRBC Meeting Minutes of May 10, 2010, accessed at: <http://bit.ly/2yOjPmC>

<sup>8</sup> Extracted from DRBC website 9.14.17: <http://www.nj.gov/drbc/programs/natural/archives.html#2> as per “Determination of The Executive Director Concerning Natural Gas Extraction Activities in Shale Formations Within The Drainage Area of Special Protection Waters”, Carol R. Collier, Executive Director, May 19, 2009

## **Water Withdrawals and Wastewater**

The DRBC's proposed regulations of exportation/withdrawal of waters from the Basin fails to account for the type of in-depth analysis that is necessary to understand the hydrogeologic and hydrologic traits of the Basin and surrounding areas under the pressure of voluminous withdrawals. At the watershed and sub-watershed level, allowing extraction of this level will have negative impacts endangering this high quality ground and surface water resource for four states.

Further, substantive issues such as ecological resources and stormwater management are not addressed by the proposed regulations. Impacts to aquatic and other resources must be addressed. Invasive species controls as well as erosion and sedimentation plans must be addressed in a comprehensive manner in the proposed regulations to demonstrate whether withdrawals could proceed in a safe manner for the Basin. For example, invasive aquatic species of algae growth from contamination by the taking of water for fracking can result in a devastating affect (such as *Didymo*, commonly known as "Rock Snot") during transfer of waters introduced or from other watershed and equipment. For the trout anglers that frequent the Delaware River Basin, the impacts can make a beautiful river unfishable, with huge negative economic impacts.

The DRBC's proposed policy to "discourage the importation of wastewater into the Basin" and the proposed regulations of section 440.5 will not provide effective protection for the Basin from the impacts of wastewater. In protecting a waterway that is of the high environmental quality of the Delaware River Basin, fracking wastewater presents a looming disaster. The numerous potential negative impacts from hydraulic fracturing wastewater outweigh the effort to regulate same. Among the various issues, I note that the categories of chemicals, and the type of facility (and permitting) required for effective treatment, present enormous hurdles for high quality cold water fisheries. Simply stated, treated wastewater poses a significant threat to the fishery. Whether treated inside the Basin watershed, or already treated and imported by private companies (which, could be just as, if not more dangerous due to potential poor quality control practices),<sup>9</sup> wastewater treatment is an imperfect science and the degradation of watersheds due to allowance of wastewater management is not uncommon.

Finally, Congressman John Faso recently recognized the importance of the Delaware River in Washington D.C.<sup>10</sup> The resolution presented in the U.S. House of Representatives on March 21, 2018 acknowledges and celebrates the natural resource value and growing importance

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<sup>9</sup> I note that section 440.5(b) appears to prohibit the importation of treated fracking wastewater from outside of the Basin, however, if an interpretation finds ambiguity with this subsection, the Commission should take into account the potential dangers of accepting imported treated fracking wastewater from outside of the Basin.

<sup>10</sup> The Congressman's resolution in the House demonstrates a bipartisan acknowledgment of the ecologic importance of the Delaware River Basin. Whether or not the Congressman supports the DRBC proposed regulations in the current form is inconsequential to the overriding objective that the Basin must receive the highest quality of environmental protection to preserve such an ecological treasure, which includes prohibition of hydraulic fracturing and all related activities. Of course, the Congressman's support of a prohibition of hydraulic fracturing and all related activities in the Basin would be welcomed.

of the Upper Delaware River that has resulted in robust regional tourism and recreation economy in Delaware and Sullivan Counties of New York. “The Upper Delaware River watershed is tremendously important to our regional economy. It attracts visitors from around the globe who come to enjoy the top notch outdoor and nature-based experiences it offers, while at the same time supporting our local businesses,” said Faso. “The river is part of the National Park system, and one of the most picturesque scenic byways in the country runs along its shores. Upstate New Yorkers understand how important the river is to their social, cultural, and economic identity....”

### **Conclusion**

It is clear that the proposed regulations in the current form do not fully protect the Delaware River Basin’s watershed. The comments submitted by this letter identify substantive and significant issues relating to Sections 440.4 and 440.5 of the proposed regulations and generally, regarding any fracking related activities in the Basin. After exhaustive study, the State of New York prohibited fracking based on environmental and public health analysis. The NY Department of Health concluded that the overall weight of the evidence demonstrated the likelihood of the occurrence of adverse health outcomes and environmental impacts from fracking could not be prevented, leading to the Governor’s decision to ban high volume hydraulic fracturing in the state.<sup>11</sup> The potential negative impacts stemming from these activities would have long-term consequences for the Delaware River Basin.

Therefore, I respectfully request that the DRBC strike Sections 440.4 and 440.5 from the proposed regulations and revise the proposed regulations to prohibit any activities related to natural gas development and hydraulic fracturing; including without limitation, the storage, treatment, disposal and/or discharge of fracking wastewater within the Basin and the withdrawal of water from the Basin for fracking. Additionally, I fully support the DRBC in upholding the proposed prohibition to hydraulic fracturing in the Basin.

Thank you for your considerations.

Very truly yours,



John L. Barone

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<sup>11</sup> [http://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/findingstatevhf62015.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatevhf62015.pdf)  
[http://www.health.ny.gov/press/reports/docs/high\\_volume\\_hydraulic\\_fracturing.pdf](http://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf)